T-2455-91

Between:

UNIVERSAL GRAPHICS LTD.,

Plaintiff,

- and -

HER MAJESTY THE QUEEN,

Defendant.

REASONS FOR ORDER

JOHN A. HARGRAVE
PROTHONOTARY

These reasons arise out of the Defendant's written Rule 324 motion, to dismiss for want of prosecution the Plaintiff's action which was commenced in September of 1991. In the alternative, the Defendant, who has provided her affidavit of documents and who has asked for production of the Plaintiff's documents, but without any result, seeks an order for production of documents. The Plaintiff, although given ample notice both by letter and by service of the material, has ignored the present motion. To so delay and ignore the Defendant, and indeed to ignore the whole matter, including this motion, borders on an abuse of process. But more important such insolent behaviour frustrates the reason for the existence of courts as a place to which people may bring disputes for orderly resolution.

The usual approach to a want of prosecution motion is to apply *Birkett v. James* (1978) A.C. 297 in which the House of Lords approved the test set out by the Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.* (1968), 2 Q.B. 229. While both Lord Diplock and Lord Salmon wrote complementary concurring reasons, it is Lord Salmon's explanation of the rule for striking out as a three part test, by which the defendant must show inordinate delay, that the inordinate delay is inexcusable and that the defendants are likely to be seriously prejudiced by the delay, as set out at page 268, that is usually applied. It may be that Lord Diplock's broader formation of the rule, with two separate and alternative branches, requiring either intentional and contumelious default or inexcusable delay giving rise to a substantial risk that a fair trial will not be possible (page 259) is now the more relevant as it allows more freedom to deal with delay, a real cost and problem in contemporary litigation. However, the test that has been applied on many occasions by this Court is the three element test enunciated by Lord Salmon. The success of an application to strike out, under the rule in *Allen v. Sir Alfred McAlpine* as applied by the Federal Court on a motion under Rule 440, depends on showing inordinate delay, lack of a credible excuse and prejudice.

In the present instance there is inordinate delay. No excuse has been tendered. But the Defendant, who is spending tax payers' money to defend and to

try to move the Plaintiff, who seems to have no intention of proceeding with this action, cannot show prejudice, other than that inherent in the passage of time, some six years since the action was commenced.

Injustice can often result from the strict application of the test, for a defendant may be unable to show prejudice despite the passage of many years. This issue recently came before the House of Lords in *Grovit v. Doctor* (1997) 1 W.L.R. 640.

In *Grovit v. Doctor* the plaintiff brought an action in defamation against seven defendants as to an admitted publication of a statement said, by the defendants, to be justified. The trial judge, in 1992, at which time the plaintiff had done nothing for two years, found an element of prejudice, but the critical point in his decision to strike out the action was the lack of interest shown by the plaintiff in pursuing an action which was virtually dead in the water. The trial judge referred to the action, by a plaintiff who had no intention of proceeding, as intolerable, yet recognized that there had been no real prejudice in the way the word is applied in the context of striking out. As a rhetorical question, the trial judge asked:

"Does that mean that the courts are powerless unless the defendant can show prejudice? It is said that the sword of Damocles argument only ought to be used or acceded to in exceptional cases. I do regard this as a case where the court is fully entitled to say that the very existence of an action which the plaintiff has no interest in pursuing is intolerable and there is no reason why defendants, some of whom are no longer in any way connected with the corporation and may (to their great relief) not have to be concerned with any of the other litigation, should still have this hanging over them." (quoted from the House of Lords decision at page 646)

The trial judge struck out the action.

Lord Justice Evans, of the Court of Appeal, suggested that abuse of process, referred to in Lord Diplock's formulation of the rule for striking out, in *Birkett v. James*, at 318, was a separate ground for striking out.[1] The Court of Appeal upheld

[1]The passage to which Lord Justice Evans refers deals with the power to strike out under O.25, r. 1:

"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

See also the passage from Lord Diplock's reasons in *Allen v. Sir Alfred McAlpine & Sons Ltd.* (supra) at pages 259 and 260, where the tests for striking out are set out as alternatives, either an intentional and contumelious default, or inexcusable delay giving rise to a substantial risk that a fair trial will not be possible.

the trial judge's decision, but from a slightly different perspective, finding prejudice in the fact of delay resulting from an abuse of process. This abuse of process, together with the protracted anxiety caused to the defendants amounted to significant prejudice.

Lord Wolf, who wrote the reasons for the House of Lords, touched upon criticisms of the serious prejudice branch of the test, including an undermining of the Court's power to strike out proceedings as a sanction against delay, thus prolonging litigation; that the definition of prejudice is too strict, with little regard paid to the anxiety caused to litigants as a result of delayed litigation; and the dilemma of a defendant required, on the one hand, to show the recollection of a witness has been adversely affected, but knowing that if the action is not struck out the defendant has undermined its own case, by commenting adversely about its witness. The House of Lords noted specific criticism and a need for change both in substance and procedure for "... the principles laid down in *Birkett v. James* are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover, they then breed excessive further delays and costs in their application." (page 643). All of these are practical considerations too often faced by defence counsel bent on bringing some degree of certainty to the affairs of a client confronted by a plaintiff who is not interested in moving an action in an orderly manner to a conclusion.

The House of Lords side-stepped the prejudice branch of the test from the *Allen v. McAlpine* and *Birkett v. James* cases by pointing out that if there is an abuse of process one need not show prejudice in order to have an action dismissed

for want of prosecution and that the delay of over two years, by the plaintiff, was conduct amounting to an abuse of process:

"The courts exist to enable parties to have their disputes resolved. To commence and continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings brought is entitled to apply to have the action struck out and if justice so require (which will frequently be the case) the courts will dismiss the action." (page 647).

This lead to the key conclusion that evidence as to the inactivity of a plaintiff may support an application to dismiss for want of prosecution, but if there is an abuse of process it is not necessary to establish want of prosecution under the *Allen v. McAlpine* and *Birkett v. James* test:

"The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James* (1978), A.C. 297." (loc. cit.)

However, while the House of Lords dismissed the plaintiff's appeal, thus upholding the striking out by the trial judge, it left open the interesting point which the House of Lords felt had been raised by the trial judge, whether an action might be dismissed for want of prosecution where the evidence fell short of what is required under either of the limbs of the traditional test. Lord Woolf, who wrote the judgment in which the other Law Lords concurred, appreciated the reasons why the trial judge believed he

could adopt this approach, but preferred to leave the question open until the issue might be fully argued on both sides.

Our Court has a substantial number of actions on file which are long in the tooth. In some instances this is a natural result of circumstances and subject matter. In other instances, it may be the result of a plaintiff who has lost interest, but who is not prepared to drop a proceeding, an exercise which continues to cost a defendant in time, money and anxiety. The Court ought to be able to give relief in appropriate circumstances without resorting to the fiction of discovering prejudice by an assumption that the memories of witnesses have faded over time, or worse, by requiring the defendant to show, in fact, that the memories of witnesses have faded, thus prejudicing a defendant's position if the motion is unsuccessful.

Here, there is a six year unexplained delay by the Plaintiff who appears to have no intention of proceeding with its action, but no indication of prejudice. This action is struck out by reason of inordinate delay by the Plaintiff who not only tenders no excuse, but also shows no interest.

(Sgd.) "John A. Hargrave"
Prothonotary

Vancouver, British Columbia
August 18, 1997

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:	**UNIVERSAL GRAPHICS LTD.**
	- and -
	HER MAJESTY THE QUEEN
COURT NO.:	**T-2455-91**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF COUNSEL.

REASONS FOR ORDER OF
MR. JOHN A. HARGRAVE, PROTHONOTARY
dated August 18, 1997

WRITTEN SUBMISSIONS BY:

Mr. Donald N Cherniawsky	**for Plaintiff**
Mr. Bruce Logan	**for Respondent**

SOLICITORS OF RECORD:

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